

[Products Liability Law Daily Wrap Up, TOP STORY—DAMAGES—M.D. Fla.: Jury instruction error gives rise to appeal, not reinstatement of \\$20M punitive damages verdict, \(Aug. 11, 2016\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

In an *Engle*-progeny case, an appeal was the proper way to handle an error of law in jury instructions on punitive damages, not the reinstatement of a \$20.7 million punitive damages verdict assessed against tobacco companies for their fraudulent concealment of and conspiracy-to-conceal the health hazards of cigarettes, a federal district court in Florida determined. Based on a decision by the Florida Supreme Court that *Engle*-progeny plaintiffs could seek punitive damages with respect to negligence and strict liability claims, the district court's instructions to the contrary constituted an error of law that was appropriate for correction on appeal, not on a motion for relief from judgment (*Berger v. Philip Morris USA, Inc.*, August 9, 2016, Carr, J.).

Procedural background. The smoker, who developed CPOD allegedly as a result of her addiction to the nicotine in cigarettes, had sued Philip Morris USA, Inc. (PM USA) and a number of other big tobacco companies on theories of negligence, strict liability, fraudulent concealment, and conspiracy-to-conceal. After a trial, the jury returned a verdict for the smoker on all four theories, and found that PM USA was liable to her for [\\$6.25 million in compensatory damages](#). The jury also found that the smoker was 40 percent comparatively at fault, thus reducing her compensatory recovery to \$3.75. Based on jury instructions given at the end of the liability trial, the jury also awarded [\\$20.76 million in punitive damages](#) on the smoker's fraudulent concealment and conspiracy-to-conceal claims million [see *Products Liability Law Daily's* September 19, 2014 [analysis](#) for complete details]. Following the verdict, the court granted PM USA's motion for judgment as a matter of law with respect to the fraudulent concealment and conspiracy-to-conceal claims, finding that the evidence failed to establish that the smoker had relied on PM USA's concealments and misrepresentations about the hazards of cigarette-smoking. In the same order, the court vacated the \$20.7 million punitive damages award [see *Products Liability Law Daily's* April 27, 2015 [analysis](#)]. The court [refused](#) to grant the smoker's motion for reconsideration.

Soffer decision. On March 17, 2016, the Florida Supreme Court overturned its initial decision in *Soffer v. R.J. Reynolds Tobacco Co.* (*Soffer I*), holding in *Soffer II* that *Engle*-progeny plaintiffs could seek punitive damages with respect to their negligence and strict liability claims, as well as on their fraudulent concealment and conspiracy-to-conceal claims [see *Products Liability Law Daily's* March 17, 2016 [analysis](#)]. Shortly thereafter, the smoker in the case at bar filed a notice of supplemental authority alerting the district court to the decision in *Soffer II* and informed the district court that the Eleventh Circuit had suspended the all notices of appeal pending the resolution of three of PM USA's tolling motions. Several weeks later, the smoker filed the present motion for relief from judgment pursuant to Rule 60(b), arguing that the court had jurisdiction to entertain and grown this motion because the Eleventh Circuit had suspended the notice of appeal until the district court resolved the pending tolling motions.

Smoker's argument. The smoker argued that *Soffer II* represented an intervening change in the law that amounted to an extraordinary circumstance, thereby warranting relief from the judgment under Rule 60(b)'s catch-all provision because (1) the judgment has not yet been executed; (2) the four-and-a-half-month delay between the final judgment and her Rule 60 motion was "minimal, particularly given the 20-year history of the *Engle* litigation;" (3) *Soffer II* arises from the same *Engle*-litigation as the smoker's case; and (4) relief was appropriate, in the interest of comity with the Florida state courts.

In support of the smoker's suggested remedy—the reinstatement of the \$20.7 million punitive damages verdict—she argued that the court should "unhook" the punitive damages award from the fraudulent concealment and

conspiracy-to-conceal claims that were the basis of that award and attach the award to the negligence and strict liability claims, even though the jury did not decide specifically whether the conduct underlying those claims warranted punitive damages. In the alternative, the smoker asked the court to remand the case for a new trial on whether punitive damages should be imposed for the strict liability and negligence claims.

Decision. The court agreed that the smoker had identified a genuine legal error in the court's punitive damages jury instruction, which informed the jury not to consider whether to award punitive damages on the smoker's negligence and strict liability claims. The ruling in *Soffer II* clarified that under Florida law, *Engle*-progeny plaintiffs were entitled to seek punitive damages on their non-intentional tort claims.

However, Rule 60(b) was not the proper vehicle for relief in cases such as the one at bar, in which the moving party could seek redress on appeal. Both PM USA and the smoker had filed notices of appeal and cross appeal, respectively, and the facts surrounding the jury instruction on punitive damages did not appear to be in dispute. The error presented was purely one of law and, thus, was appropriate for correction on appeal.

The court also expressed due process concerns about the smoker's proposed remedy, *i.e.*, simply reinstating the \$20.7 million punitive damages verdict given that the jury never decided whether the conduct underlying the strict liability and negligence claims called for such an award. The court was also skeptical of PM USA's argument that the court could not hold a limited retrial on the issue of punitive damages, but instead had to retry the entire case. Both these alternatives appeared inconsistent with the remedy fashioned by the Florida Supreme Court in *Stoffer II*, which was to conduct a limited retrial on the issue of punitive damages.

Rather than speculate as to the appropriate remedy, however, the court deferred to the judgment of the Eleventh Circuit on appeal and promised to implement the instructions issued by that court.

The case is No. [3:09-CV-14127](#).

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Companies: Philip Morris USA, Inc.; Liggett Group, LLC

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